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No. 88-1834 (2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

PENNZOIL COMPANY, and
VERMEJO PARK CORPORATION,
Petitioners,

v.

LOUIS KESTENBAUM,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the federal claims raised in the petition were brought to the attention of the state courts below "with fair precision and in due time" so as to confer jurisdiction on this Court under 28 U.S.C. § 1257?

II. Whether federal law mandates the firing of an employee with a contract of employment which permits his discharge "only for a good reason," where the employer had no reasonable basis to believe allegations that the employee is guilty of sexual harassment of fellow employees?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
REASONS WHY THE PETITION SHOULD BE DENIED	4
I. The Federal Questions Presented in the Petition Were Not Brought to the Attention of the State Courts Below "With Fair Precision and in Due Time" So As to Confer Jurisdiction on This Court Under 28 U.S.C. § 1257	4
II. Even If the Federal Questions Had Been Properly Presented and Preserved Below, There Are No Compelling Reasons to Grant the Writ in This Case, Because Federal Law Does Not Mandate the Firing of an Employee Where the Employer Has No Reasonable Basis to Believe That the Employee Is Guilty of Sexual Harassment	8
CONCLUSION	13
APPENDICES	1a
Appendix A (Transcript of directed verdict argument)	1a
Appendix B (Transcript of jury instruction argument)	2a
Appendix C (Excerpts from Pennzoil's Brief-in-Chief below)	5a
Appendix D (Jury instructions 16, 17, and 18)	9a

TABLE OF AUTHORITIES

Cases: Page

Allen v. McCurry, 449 U.S. 90 (1980) 7
Beck v. Washington, 369 U.S. 541 (1962) 7
California Federal Savings & Loan Ass'n v. Guerra, 93 L. Ed. 2d 613 (1987) 9
Cardinale v. Louisiana, 394 U.S. 437 (1969) 7
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 7-8
Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 10
French v. Mead Corp., 33 Fair Empl. Prac. Cas. (BNA) 635 (S.D. Ohio 1983), *aff'd without opinion*, 758 F.2d 652 (6th Cir.), *cert. denied*, 474 U.S. 820 (1985) 11
Frazier v. Colonial Williamsburg Foundation, 574 F. Supp. 318 (E.D. Va. 1983) 10
Hathorn v. Lovorn, 457 U.S. 255 (1982) 5
Illinois v. Gates, 462 U.S. 213 (1983) 7
Mughal v. Chart House, Inc., No. 85-5396 (N.D. Ill., Aug. 27, 1986) 11
New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928) 7
Novak v. Dow, 82 N.M. 30, 474 P.2d 712 (Ct. App. 1970) 7, 8
Poorbaugh v. Mullen, 99 N.M. 11, 653 P.2d 511 (Ct. App.), *cert. denied*, 99 N.M. 47, 653 P.2d 878 (1982) 6
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 4-5
Schwartz v. Texas, 344 U.S. 199 (1952) 10
Simmerman v. Nebraska, 116 U.S. 54 (1885) 5
State v. Curlee, 98 N.M. 576, 651 P.2d 111 (Ct. App. 1982) 5

Statutes:

28 U.S.C. § 1257 ..... 4, 7, 8
42 U.S.C. § 2000e, *et seq.* 4, 9, 10

Regulations:

29 C.F.R. § 1604.11(d) 9, 10

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Louis Kestenbaum, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the New Mexico Supreme Court's opinion in this case. That opinion is reported at —— N.M. ——, 766 P.2d 280 (1988), and is reprinted in full in Appendix A to the petition. (Pet. 1a-21a.)

STATEMENT OF THE CASE

Respondent, Louis Kestenbaum was awarded damages for breach of an employment contract with Pennzoil, under which he could be discharged "only for a good reason."[1] (Pet. 12a) Petitioners would have this Court be-

[1] Both during the trial and on appeal the thrust of Pennzoil's defense was two-fold: 1) that Kestenbaum was an employee at will, subject to termination without cause, and 2) if his contract required cause to dismiss him, that Pennzoil had sufficient grounds—found in the report of its staff who investigated the anonymous sexual harassment charges against Kestenbaum—to justify its belief that dismissal was warranted. (*See* Pet. 3a).

lieve that Mr. Kestenbaum was dismissed only after an "extensive" (Pet. 3) and "thorough" (Pet. 4) investigation into anonymous sexual harassment charges, which led Pennzoil to "correctly . . . believe[]" that his firing was required. (Pet. 15) Petitioners describe at some length the nature of that investigation, (Pet. 4-7), but leave out critical facts of record, a summary of which is set forth in the margin.[2] Indeed, many of these impor-

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[2] Ms. McCormick, who led the investigation, had no actual field experience in investigation (McCormick Depo. at 74); she did not understand the need to uncover the bias of witnesses, and did not know the techniques to do so (*id.* at 98). She never considered that some of the informants might have a motive to give false information, and made no inquiry into people's motives (*id.* at 96); nor did she question any witnesses' powers of observation, or opportunity to observe (*see id.* at 183-86).

Neither Mr. Lew, (the other investigator), nor Ms. McCormick determined whether persons interviewed were reporting firsthand information or merely reporting complaints by others, (Tr. 308-09), and Ms. McCormick admitted that she did not distinguish between hearsay attributed to an identified person, information based on actual observation of the person interviewed, and mere rumor or gossip (*see* McCormick Depo. at 135-37, 141). The investigators devised no system to cross-check the information they were receiving because "[w]e were reviewing each employee independently and we were not sharing an employee's testimony with another employee . . ." (Tr. 531; McCormick Depo. at 99). Because they were only instructed to interview female employees (*see* Pennzoil Brief-in-Chief below at 4), they failed to follow up with interviews of males who they knew might provide corroborating or contradictory information on important points (McCormick Depo. at 151).

Mr. Lew avoided making any judgments about the relative importance of the information they were receiving (Tr. 321-22). Ms. McCormick reported all information, whether or not she believed the informant (McCormick Depo. at 101), although McCormick was of the mind that allegations were "substantiated" whenever they had information—either firsthand or secondhand—concerning that allegation (McCormick Depo. at 107). Furthermore, whenever they received positive comments about Mr. Kestenbaum, they merely noted that the person had no problems. They apparently asked no follow-up question to these positive comments,

tant facts of record were relied on by the Supreme Court of New Mexico, in support of its conclusion that "there was substantial evidence to support the jury finding that Pennzoil did not act upon reasonable grounds." (Pet. 16a-17a)

Pennzoil's claim on appeal was that it need not show that a "*reason in fact* existed" for Kestenbaum's dismissal, but only that it had "a *good faith belief* that cause existed to terminate." (Pet. 15a-16a) (Emphasis added.) The New Mexico Supreme Court rejected this "bipolar" approach, and concluded instead that the proper "middle position," was taken by the trial court in instructing the jury to consider whether Pennzoil "had *reasonable grounds to believe* that sufficient cause existed to justify [its] actions in discharging the plaintiff." (Pet. 16a, *quoting* Jury Instruction No. 8 as given). (Emphasis added.) Thus, the New Mexico Supreme Court also held that "[t]he trial court correctly denied Pennzoil's requested Instruction No. 15 because it erroneously suggested the jury could find good cause from the employer's subjective good faith belief as opposed to an objective standard of reasonable belief." (*Id.*)

In its Motion for Rehearing in the New Mexico Supreme Court petitioner, took the position, *for the first*

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as they did when problems were reported. (McCormick Depo. 180-81).

Finally, David Richardson, a qualified expert on investigative techniques, (Tr. 796-97; 815-16), testified that Lew and McCormick did not observe standards of good investigative practice (Tr. 863-64). He identified numerous deficiencies in the investigation, including the failure to confirm the reports of persons interviewed; the failure to document hearsay; the failure to distinguish hearsay from rumor; the failure to follow up on and reconcile inconsistencies; the failure to keep good notes; and the failure to check the physical layout of the ranch to see if purported eye witnesses were in a position to see what they claimed to see (Tr. 892-96). He also identified specific breaches of good investigative practices (Tr. 908-18), including the failure to interview readily available key witnesses in person (*see* Tr. 909-11).

time in this litigation, that the objective standard of reasonable belief, applied by the trial court and the New Mexico Supreme Court, as a matter of state common law, is preempted by the federal statutory obligations imposed on Pennzoil by virtue of Title VII of the Civil Rights Act of 1964, as amended. *See* 42 U.S.C. § 2000e, *et seq.* Pennzoil thus claimed in its rehearing motion that federal law requires, as a matter of federal supremacy, the application of a "subjective good faith" standard of good cause, rather than an objective, reasonable basis standard, when the firing involves an allegation of sexual harassment.[3] Pennzoil's motion for rehearing was summarily denied, without any mention of the constitutional issues raised for the first time in that motion. (*See* Pet. 22a)

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Federal Questions Presented in the Petition Were Not Brought to the Attention of the State Courts Below "With Fair Precision and in Due Time" So As to Confer Jurisdiction on This Court Under 28 U.S.C. § 1257.

Pennzoil contends that "[a]t all stages of the proceedings below," it took the position that liability could not be imposed on it because the action taken against Mr. Kestenbaum—i.e., his firing—was required by federal law, and therefore preemptive of his contractual rights under state law. (Pet. 7) This is just not the case. In fact, the only time the federal preemption/supremacy issue was squarely presented to the state court was in Pennzoil's Motion for Rehearing in the state supreme court. At that juncture it came too late to confer appellate jurisdiction on this Court. *See Radio Station*

[3] *See* Pennzoil's Brief in Support of the Motion for Rehearing at 1. Pennzoil also framed its new-found federal claim as a due process violation but that claim was no more than a reiteration of its preemption/supremacy claim. *See id.* at 5-6.

WOW, Inc. v. Johnson, 326 U.S. 120, 128 (1945); *Simmerman v. Nebraska*, 116 U.S. 54 (1885). Furthermore, under New Mexico's appellate regime, which bars presentment of new matters on rehearing, *see State v. Curlee*, 98 N.M. 576, 579, 651 P.2d 111, 114 (Ct. App. 1982) ("it has been an unwavering rule in this jurisdiction for almost seventy years that new points may not be presented in a petition for rehearing."), the state supreme court's summary denial is properly deemed no more than a state court recognition that the federal question was not considered because of a state procedural rule applied consistently and evenhandedly. *Compare Hathorn v. Lovorn*, 457 U.S. 255, 262-65 (1982).

In fact, the concepts of preemption and supremacy were never mentioned either pretrial or at trial. In Pennzoil's first three recitations to points at which the federal questions were supposedly raised—their partial summary judgment motions, and the pretrial statement (*see* Pet. 8-9)—neither supremacy nor preemption were ever mentioned.[4] Similarly, at the directed verdict stage, the only recitation of counsel for Pennzoil was to the duties imposed on an employer when confronted with accusations of sexual harassment, without any mention of premeption/supremacy. (*See* Tr. at 2177-78, *quoted in full* at Appendix A, *infra*)

Most important, at the time the jury instructions were settled, when the focus of attention turned to Pennzoil's requested instruction number 15, dealing with the subjective good faith standard, there was not one word of

[4] The summary judgment memorandum on the claim of intentional interference with contractual relations, (*see* Pet. 8), only pointed to the Title VII basis for the investigation, and, in any event, the claim of intentional interference with contractual relations was removed from the case on directed verdict. (Tr. 2249) Also, Pennzoil's summary judgment memorandum only spoke to its duty to investigate and take appropriate actions (Pet. 8-9) and its pretrial statement merely reference that the federal law and regulations were "involved in this matter." (Pet. 9)

contention or argument dealing with preemption or supremacy.[5] (*See* Tr. 2487-91, *quoted in relevant part* at Appendix B, *infra*). Indeed, counsel for Pennzoil not only did not raise those issues, he affirmatively approved the reasonableness standard which the trial court adopted and submitted to the jury. *See* Appendix B, *infra*.

Only after judgment was entered did Pennzoil, in its memorandum in support of its motion for new trial, (R.P.-533) make its first vague reference to the frustration of the purpose of Title VII. (Pet. 10) Even that general statement, however, was only in support of an erroneous contention that the trial court had placed the burden on the employer to prove that the employee was "guilty of sexual harassment," (*id.*), when in fact no such burden had been placed on petitioners. Thus, the trial court had every right to reject that argument, wholly independent of any vague implication of preemption.

Furthermore, any claim that the good faith belief standard was compelled by federal law, assuming it was raised in the new trial argument, comes too late. Under New Mexico procedures, arguments over the jury instructions must be made prior to submission of the case to the jury and with sufficient precision to "specifically guide the mind of the trial court to the claimed vice . . . so that it may be corrected." *Poorbaugh v. Mullen*, 99 N.M. 11, 17, 653 P.2d 511, 517 (Ct. App.), *cert. denied*, 99 N.M. 47, 653 P.2d 878 (1982).

Not only was the preemption/supremacy issue not raised at trial, but also, it was not argued in the direct appeal to the New Mexico Supreme Court. It is not insignificant that Petitioners do not cite to their Brief-in

[5] Contrary to Pennzoil's suggestion, (*see* Pet. 9-10), Petitioners' requested instruction 14 had nothing to do with the sexual harassment charge. It only related to their disproved alternative charge that Mr. Kestenbaum engaged in illegal conduct in the service of liquor to minors. (*See* Pet. 14a-15a)

Chief, (*see* Pet. 11) because a cursory review of the relevant portions of that document (*see* Appendix C, *infra*), makes clear that no such preemption/supremacy claim was ever made in the appellate court. Issues raised but neither argued nor supported by authority on appeal are deemed abandoned in New Mexico. *E.g., Novak v. Dow*, 82 N.M. 30, 474 P.2d 712 (Ct. App. 1970).

Under these circumstances, it is clear that the federal claim was not "brought to the attention of the state court with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). Furthermore, even if sufficiently raised in the trial court, the federal questions were waived in the appellate court by Pennzoil's failure to assign them as errors or argue them as points in their brief. *See Beck v. Washington*, 369 U.S. 541, 553 (1962); *Novak v. Dow, supra.*

The important policies which underlie the jurisdictional requirement, contained in 28 U.S.C. § 1257(3), that the federal claim be "specially set up or claimed" would be undermined by the granting of certiorari in this case. First, there is no record on the proposed federal questions because the record "was not compiled with those questions in mind," *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Second, the state court's were deprived of any opportunity to consider any adequate and independent state ground, which could render unnecessary any Supreme Court review, *see Illinois v. Gates*, 462 U.S. 213, 222 (1983). Third, and perhaps most important, granting the writ in this case would undermine the fundamental principle, rooted in our Federalism, that state courts are competent and appropriate forums for the adjudication of federal constitutional claims in cases which arise in the state system. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 105 (1980).

This Court has an independent duty to examine the record to satisfy itself that the federal questions were fairly raised in the court below. *See Exxon Corp. v.*

Eagerton, 462 U.S. 176, 181 n.3 (1983). Upon that examination, it is clear that the issues were never fairly raised in the trial court or in the normal course of the appeal, *Novak v. Dow*, 82 N.M. 30, 474 P.2d 712 (Ct. App. 1970), thus barring petitioners from seeking further review in this Court under section 1257(3).

In this case Pennzoil could have presented its federal claims to the trial court and the state supreme court, to allow those courts a fair opportunity to consider those claims. It failed to do so; it fought this case on state common law grounds; and only after a final decision by the New Mexico Supreme Court did it seek to add the federal claims, in a vain attempt to gain yet further appellate review by way of certiorari to this Court.

II. Even If the Federal Questions Had Been Properly Presented and Preserved Below, There Are No Compelling Reasons to Grant the Writ in This Case, Because Federal Law Does Not Mandate the Firing of an Employee Where the Employer Has No Reasonable Basis to Believe That the Employee Is Guilty of Sexual Harassment.

Assuming that Pennzoil's federal questions were properly presented and preserved below, those claims are so patently lacking in merit that there can be no compelling reason to grant the writ in this case. Even a cursory analysis of Pennzoil's petition shows that this case presents no issues of preemption, supremacy or due process worthy of this Court's plenary review.

Pennzoil's entire argument rests on its contention that Mr. Kestenbaum's judgment for breach of contract under state common law, "is inconsistent with Title VII, since *Pennzoil's actions*, which formed the basis for the jury's finding of breach of contract, *were required* by Title VII." (Pet. 12) (Emphasis added.) Thus, petitioners' entire argument—whether based in preemption/supremacy, (Pet. 13), or in due process, (Pet. 17)—is built on

the fundamental premise that the federal Civil Rights Statute *required* them to discharge Mr. Kestenbaum,[6] even though they lacked a reasonable basis for their belief that he engaged in sexual harassment.

There is nothing in the Civil Rights Act itself, nor in the legislative history which evidences that Congress ever intended the Civil Rights Act provisions against sex discrimination to foreclose a state court from applying a "reasonable grounds for belief" standard when judging whether there exists sufficient good cause to allow an employer to fire an employee accused of sexual harassment. Similarly, there is nothing in the federal law, federal regulations, legislative history, or federal agency decisions, which indicates that federal law compels a "subjective good faith belief" standard in such cases. As a result, the premise underlying Pennzoil's federal claims is false. All of Pennzoil's arguments must therefore fail, because they are all based on this totally incorrect premise.

It is not surprising that petitioner points to nothing in the statute, the legislative history of Title VII, the implementing regulations, or the cases construing the act, which support such a contention, because there is no such authority. Indeed, the provisions of the law suggest just the opposite. First, Congress has explicitly provided that Title VII shall not have preemptive effect, except to the extent state law "purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter." 42 U.S.C. § 2000e-7. *Cf. California Federal Savings & Loan Ass'n v. Guerra*, 93 L. Ed. 2d 613, 633 (1987) (Scalia, J., concurring) (Title VII preemption provisions "are more precisely *antipre-emption* provisions, prescribing that nothing in

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[6] Indeed, there are a host of disciplinary actions short of termination, which, in the appropriate case, could meet an employer's Title VII obligations to take "appropriate corrective action." 29 C.F.R. § 1604.11(d).

Title VII . . . shall be deemed to preempt state law unless certain conditions are met."); *Frazier v. Colonial Williamsburg Foundation*, 574 F. Supp. 318 (E.D. Va. 1983) (no preemption when fired worker sues both for violation of Title VII and breach of contract without cause). Second, the applicable federal regulations make clear that Title VII imposes liability upon employers for acts of sexual harassment committed by employees, *only if* the employer "knows or should have known" of the acts and fails to take "immediate and appropriate remedial action." 29 C.F.R. § 1604.11(d). By use of the terms "know or should have known" the federal regulation thereby incorporates the very objective, reasonable basis standard which was applied by the trial court in this case.

Against this statutory backdrop—and with nothing further in the law, legislative history, or cases to point to a contrary intent of Congress—this Court should be "reluctant to infer preemption." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978); *see Schwartz v. Texas*, 344 U.S. 199, 203 (1952) ("The exercise of federal supremacy is not lightly to be presumed.")

Furthermore, far from undercutting Title VII, the judgment and proceedings in this action scrupulously followed the language of Title VII and fostered the policies underlying the statute. The trial judge submitted instructions to the jury in this action which detailed the contents of Title VII. (Instruction No. 13, at R.P. 494) The instructions then explained that if a supervisor sexually harassed a subordinate, that conduct would constitute a violation of federal law (*see* Appendix D, *infra*), which, when brought to the attention of the employer, would require the employer "to investigate and take prompt appropriate remedial action." (*Id.*) The trial judge even went so far as to remind the jury, in a separate instruction, that "Evidence in a case involving sexual harassment is typically contradictory. Nonetheless,

the employer still has the duty to take action to prevent sexual harassment." [7] (*Id.*)

Thus, the jury in this case was fully informed of Pennzoil's Title VII obligations, so that it could weigh those obligations in its determination of whether Pennzoil had reasonable grounds to believe that sufficient cause existed to justify firing Mr. Kestenbaum. The judge correctly concluded that apprising the jury of these Title VII influences on Pennzoil struck a proper balance between the interest in rooting out sexual harassment and the no less compelling interest in assuring that workers' contractual rights to job security not be infringed under the guise of a mere subjective belief of employee misconduct, unsupported by any reasonable basis to support the allegations.

Indeed, the trial court's insistence on the "reasonable employer" test is precisely the standard used in *French v. Mead Corp.*, 33 Fair Empl. Prac. Cas. (BNA) 635, 639-40 (S.D. Ohio 1983), *aff'd without opinion*, 758 F.2d 652 (6th Cir.), *cert. denied*, 474 U.S. 820 (1985), a case which petitioners incorrectly cite as authority for the proposition that a mere good faith belief of guilt, no matter how unreasonable, shields employers from liability for erroneous and unreasonable determinations that sexual harassment occurred.[8] (*See* Pet. 19).

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[7] The trial court went even further and set forth the relevant portions of the EEOC guidelines. (Instruction 14, R.P. 495-96).

[8] So too, petitioners misconstrue the ruling in *Mughal v. Chart House, Inc.*, No. 85-5396 (N.D. Ill., August 27, 1986), the only other case they cite to support their due process argument. (*See* Pet. 17-20) In that opinion, the trial court set aside a jury verdict favorable to plaintiff on his claim for wrongful discharge. The court did so because of the absence of proof that "defendant knew or should have known, at the time of plaintiff's discharge, that the charges were unfounded." (Unpaginated LEXIS printout) Thus, the court used the objective standard rather than subjective good faith to test the employer's liability.

In this case, the New Mexico courts only rejected Pennzoil's contention that subjective good faith, no matter how unreasonable, provides a shield from breach of contract actions by employees who can be fired only for good cause. The court did not impose strict liability. Instead, it ruled that the employer who erroneously fires an employee charged with sexual harassment will not be liable to the employee unless the employer was not only wrong, but also lacked a reasonable basis to believe that the employee was acting wrongfully. (*see* Pet. 16a)

Finally, as a matter of policy, petitioners' position makes no sense. The federal law attempts to rid the workplace of the evils of sexual harassment; it does not serve to provide employers with an immunizing shield for the dismissal of unwanted employees. If "subjective good faith belief" were the standard for dismissal of employees accused of sexual harassment, then mere accusations of sexual harassment—if instinctively believed by the employer—would be sufficient to dismiss employees unjustly accused of that conduct.[9] Reason must temper instinct. The ruling of the New Mexico Supreme Court requires this and no more.

Under these facts and circumstances, Pennzoil presents no substantial federal questions which merit the plenary review of this Court. There is no conflict with Title VII presented here; there is no federal question which needs settling by this Court; and there is no de-

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[9] Petitioners, for the first time in the entire proceedings, also present to this Court a new standard, contradictory to the subjective good faith standard they urged below. (*See* Pet. 26-27) Their new proposal seeks to import principles forged in tort law in light of the First Amendment, into a contract claim having no free speech implications. It is also based on the false assumption that New Mexico leaves employers with only one defense—"that the allegations of sexual harassment were in fact true." (Pet. 26) To the contrary, New Mexico permits the defense that, though the charges were false, the employer had a reasonable basis to believe that they were true. (*See* Pet. 16a)

cision which is in conflict with the decisions of either this Court or the federal courts of appeals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

ENTIRE DISCUSSION OF FEDERAL LAW IN PENNZOIL'S ARGUMENT ON ITS MOTION FOR DIRECTED VERDICT
Tr. 2177-78

MR. HUDSON for Pennzoil:

Given this evidence we must now look at the position of the employer. It cannot be questioned that upon receipt of the evidence, the employer has the duty to investigate and to take prompt, appropriate, remedial action. It is recognized that—by the EEOC guidelines and by all the courts, that the facts in a sexual harassment case are always contradictory. It's always fact-defensive, and it has to be made on a case-by-case basis. Nonetheless there is a potential liability for the employer, if a claim is filed, and he does not handle the allegations properly. There is also an implicit obligation within Title 7 to protect employees from discrimination, whether it's sexual, racial, religious, or any kind; and in this case, you know, we were dealing with many young, female employees. In addition the employer was not faced with simply an isolated instance, but with a number of instances of different kinds of sexual harassment.

APPENDIX B

RELEVANT PORTIONS OF PENNZOIL'S ARGUMENT IN SUPPORT OF ITS REQUESTED INSTRUCTION 15
Tr. 2487-91

MR. SHANOR for Pennzoil:

Well, it's proffered to the Court as a statement of the law as we view it, and it's definitely an issue in the case, as to whether or not it is the obligation of this defendant to prove in fact that Mr. Kestenbaum was guilty of sexual harassment, as opposed to our obligation to prove that we had a reasonable belief that the charges were substantiated to provide a reason for the discharge, and—

THE COURT: Mr. Shanor—I'm sorry. I didn't mean to interrupt you.

MR. SHANNOR: That's all right.

THE COURT: I'm not sure that we disagree, but I'm not sure that I agree, either. The plaintiff in this case bears the burden of proving, if there was a good-reason requirement to fire him, that he was fired for what was not a good reason. The employer can defend, it would seem to me, by showing there was, in the context of all that occurred, happened, a good reason; that is to say, the employer may defend by showing that the plaintiff, of course, failed by a preponderance of the evidence to establish that he was not fired for a good reason. A good reason the Court thinks can go into all of the matters that have been recited into evidence, everything that happened.

* * * *

I think this injects an erroneous issue—I'm sorry. I think this is not a correct statement of the law as it is now, and I think also it injects a false issue; but do you mean—do you mean by this, Mr. Shanor, so that we'll

all understand, that if the jury finds that there was no good reason to fire Mr. Kestenbaum of any kind, assuming the jury goes both to mismanagement and sexual harassment, but they are persuaded that subjectively the corporation thought there was good reason, that in such situation, the jury may find that the firing was proper?

MR. SHANOR: Not precisely, Your Honor. If I might go back and phrase it this way, it seems to me that the whole thrust of this case, as it's been presented by the plaintiff, is to disprove the question of whether or not Mr. Kestenbaum was guilty or not of sexual harassment. That's the way the case has been postured, all the way along. The purpose of this instruction is to clarify for the jury that it is not the obligation of this defendant to prove that he was in fact guilty of sexual harassment, but rather that based upon the facts reasonably considered by the employer, that they had reasonable cause to believe that he was guilty of that or mis-management, and that that was sufficient reason, and that this defendant doesn't have to prove in fact that it was sexual harassment after the fact in this court.

THE COURT: Well, I think this is just a restatement of the instruction that will be given, 3.1, that good reason—that the plaintiff has to prove by a preponderance of the evidence that good reason did not exist to fire him, and that you in turn claim that there's no showing that the corporation failed to have good reason in the firing. I think this is just surplusage, there.

MR. SHANOR: But I think the jury—the natural instinct of the jury in a case such as this is to think that the issue is, did he in fact commit sexual harassment or did he not, and the purpose of this instruction is to clarify for the jury that that is not really the issue. The issue is whether or not there was reasonable basis for the employer to think that sexual harassment had occurred, whether or not, based upon evidentiary matters, as it comes to the courthouse, would support sexual harassment.

THE COURT: Mr. Shanor, you may argue to the jury that the employer had a reasonable basis in the evidence for the conclusion that there was mismanagement and sexual harassment and that this constitutes a good reason; and I think that this is just an evidentiary matter at this point. I'm going to refuse the instruction. I appreciate your concern, particularly because an employer is involved, and because a large employer is involved, but I think it just—it clutters up the instructions, and you will have the opportunity to present a clean instruction to be refused. I think you've got your objections down very clearly for the record. Your next one, please, Mr. Shanor?

APPENDIX C

RELEVANT PORTIONS OF PENNZOIL'S BRIEF-IN-CHIEF IN THE NEW MEXICO SUPREME COURT
pp. i, 20-21, 28-30

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
I. SUMMARY OF THE PROCEEDINGS	1
II. STATEMENT OF THE CASE	3
III. ARGUMENT AND AUTHORITIES	10
A. JUDGMENT MUST BE ENTERED FOR DEFENDANTS BECAUSE THE PLAINTIFF, AS A MATTER OF LAW, WAS AN EMPLOYEE AT WILL	10
B. THE DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE PLAINTIFF'S CLAIM FOR BREACH OF IMPLIED CONTRACT WAS BARRED BY THE STATUTE OF FRAUDS	14
C. THE JUDGMENT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE	19
D. DEFENDANTS ARE ENTITLED TO A NEW TRIAL BECAUSE OF THE COURT'S ERROR IN REFUSING REQUESTED JURY INSTRUCTIONS	26
1. The Court erred in refusing Defendant's Requested Instruction No. 13A	27
2. The Court erred in refusing Defendant's Requested Instruction No. 15	28
3. The Court erred in refusing Defendant's Requested Instruction No. 14	31

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[from Argument C—judgment not supported by substantial evidence]

Second, there is no substantial evidence to support the finding that no good reason existed to terminate the Plaintiff's employment. A consideration of the evidence and the law reveals why that is an ineluctable conclusion. Upon receipt of the anonymous letter alleging sexual harassment, the Defendants had the legal duty to investigate and take prompt and appropriate remedial action. *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Barrett v. Omaha Nat'l. Bank*, 726 F.2d 424 (8th Cir. 1984); *Craig v. Y&Y Snacks*, 721 F.2d 77 (3d Cir. 1983); *Coley v. Conrail*, 34 Fair Emp. Prac. Cases (B.N.A.) 129 (U.S.D. Mich. 1982). It is the express policy of Pennzoil to prevent sexual harassment, and its occurrence can be a reason to discharge the employee. (P.E.9) The Defendants did not simply undertake a perfunctory investigation. Rather, they chose a representative of the Security Department who had conducted numerous investigations, (Tr. 380-384) and the Company's Equal Employment Opportunity representative, who was aware of the implications of sexual harassment. (Depo. of McCormick at 5-23). The investigation conducted was extensive involving the interviewing of approximately twenty-six people.

The parameters of sexual harassment, or exactly what constitutes sexual harassment are not easily definable. See, generally, *Meritor Savings Bank v. Vinson*, 477 U.S. ——, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986); The Dehumanizing Puzzle of Sexual Harassment: A Survey of the Law Concerning Harassment of Women in the Workplace, 24 Washburn L.Rev. 574 (1985). The guidelines published by the Equal Employment Opportunity Commission provide one definition, 29 C.F.R. § 1604.11, that are considered "a body of experience and informed judgment to which courts and litigants may properly resort

for guidance." *Meritor Savings Bank v. Vinson, supra*, 91 L.Ed.2d at 58. Undoubtedly, physical advances are evidence of sexual harassment. Even if they are consented to, they may be unwelcome for purposes of sexual harassment. *Id.*, 91 L.Ed.2d at 60. Moreover, the employer must be concerned with its potential liability, which may even be vicarious liability in some instances, *Schroeder v. Schock*, 42 Fair Emp. Prac. Cases (B.N.A.) 1112 (U.S.D.Kan. 1986), and liability based on traditional agency principals in others. *Meritor Savings Bank v. Vinson, supra*, 91 L.Ed.2d at 63. Through the enactment of Title VII (42 U.S.C. §§ 2000e et seq.) Congress expressed a clear intent to do away with certain conduct in the workplace. It put the onus of enforcement on employers to carry through that intent. In this case, the Defendant complied with the initial duties imposed by Title VII. They were faced with evidence of different types of sexual harassment, and were put in a position by existing law where they had to make a decision based on their reasonable beliefs. It cannot now be said that there was no valid basis for that decision.

* * * *

2. *The Court erred in refusing Defendant's Requested Instruction No. 15.*

Defendants tendered their requested Instruction No. 15 which provided:

> Where an employee is terminated for a good reason, the employer does not have to prove that the reason in fact existed. Rather, the employer need only in good faith believe that the employee engaged in conduct which was inappropriate in the work place, whether or not stated by the employer as the reason for termination.

(Tr. 2487-91). The instruction, beyond being a correct statement of the law, was essential to inform the jury the position of employer at the time of discharging an employee. Indeed, it was apparently the standard that

the Plaintiff invoked in making termination decisions. (Tr. 1878). The Court committed reversible error in refusing to give the instruction.

This case is replete with issues of sexual harassment. In a case of sexual harasssment under Title VII, the employer need not prove that the employee committed sexual harassment, but only needs a reasonable belief that sexual harassment occurred. *Crimm v. Missouri Pacific Railroad Co.*, 750 F.2d 703 (8th Cir. 1984); *French v. Mead Corp.*, 33 Fair Emp. Prac. Cases (B.N.A.) 635 (U.S.D. Ohio 1983). There are many obvious reasons for that rule of law. One reason is that evidence in sexual harassment cases is almost always contradictory; that is why appellate courts will only reverse a finding where it is clearly erroneous. *Meritor Savings Bank v. Vinson, supra; Craig v. Y&Y Snacks, supra.* Another reason is trat an employer is bound to take prompt and appropriate remedial action when it receives an allegation of sexual harassment. A third reason is that the employer faces substantial liability for sexual harassment committed by management employees. *Meritor Savings Bank v. Vinson, supra* at 63; *Schroeder v. Schock*, 42 Fair. Emp. Prac. Cases (B.N.A.) 1112 (U.S.D. Kan. 1986).

The rule of law stated in Instruction No. 15 should be the same with all employment situations. *Simpson v. Western Graphics Corp.*, 293 Or. 96, 643 P.2d 1276 (1982). An employer does not have the benefit of extended discovery, depositions, or jury trial when he makes a decision to terminate an employee. An employer must utilize available resources efficiently, and make his decision based on information available at the time. To demand that employer have a preponderance of legally admissible evidence would put an unrealistic burden on an employer. If that demand is made, it will result in all such decisions being second guessed by the courts. Clearly, that should not happen. *Kumpf v. Steinhaus, supra.*

APPENDIX D

JURY INSTRUCTIONS 16, 17 AND 18
RP-498

INSTRUCTION NO. 16

When a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex in violation of the laws of the United States.

INSTRUCTION NO. 17

Where an employer receives allegations of conduct that could amount to sexual harassment, the employer has a legal duty and obligation to investigate and take prompt appropriate remedial action.

INSTRUCTION NO. 18

Evidence in a case involving sexual harassment is typically contradictory. Nonetheless, the employer still has the duty to take action to prevent sexual harassment.